

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 12-54V

Filed: October 7, 2014

Not for Publication

MISTY KELM, Parent of B.K., a Minor, *

*

Petitioner, *

*

v. *

*

SECRETARY OF HEALTH *

AND HUMAN SERVICES, *

*

Respondent. *

*

Ronald C. Homer, Boston, MA, for petitioner.

Lara A. Englund, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING DAMAGES¹

On January 27, 2012, petitioner filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-10–34 (2006), alleging that her child, B.K., suffered neurological injuries as a result of the Measles-Mumps-Rubella (“MMR”), hepatitis A (“hep A”), and varicella vaccinations B.K. received on February 6, 2009. On September 4, 2012, respondent filed her Rule 4(c) Report, conceding that B.K. suffered a Table encephalopathy and recommending compensation.

¹ Because this decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall redact such material from public access.

On October 7, 2014, respondent filed Respondent's Proffer on Award of Compensation. The undersigned finds the terms of the proffer to be reasonable. Based on the record as a whole, the undersigned finds that petitioner is entitled to the award as stated in the proffer. Pursuant to the terms stated in the attached proffer, the court awards:

- a. a lump sum of **\$1,164,147.29**, representing compensation for life care expenses expected to be incurred during the first year after judgment (\$125,166.82), lost future earnings (\$800,000.00), and pain and suffering (\$238,980.47). The award shall be in the form of a check for **\$1,164,147.29** payable to petitioner, as guardian/conservator of B.K., for the benefit of B.K.;
- b. a lump sum of **\$7,506.60**, representing compensation for additional past unreimbursable expenses. The award shall be in the form of a check for **\$7,506.60** payable to petitioner, Misty Kelm;
- c. a lump sum of **\$165,066.70**, representing compensation for satisfaction of the State of Arkansas Medicaid lien. The award shall be in the form of a check for **\$165,066.70** payable jointly to petitioner and

State of Arkansas Medicaid
Office of Policy and Legal Services
Arkansas Department of Human Services
P.O. Box 1437, Slot S260
Little Rock, AR 72203-1437
Medicaid Case No: 148862
Attn: Ms. Angie Foster.

Petitioner agrees to endorse this payment to the State of Arkansas; and

- d. an amount sufficient to purchase the annuity contract described in section II.D. of the attached proffer. The award shall be in the form of a check payable to the life insurance company from which the annuity will be purchased.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.²

IT IS SO ORDERED.

Dated: October 7, 2014

/s/ Laura D. Millman
Laura D. Millman
Special Master

² Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party, either separately or jointly, filing a notice renouncing the right to seek review.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

MISTY KELM, parent of B.K., a minor,)	
)	
Petitioner,)	
)	
v.)	No. 12-54V
)	Special Master Laura Millman
SECRETARY OF HEALTH AND HUMAN)	ECF
SERVICES,)	
)	
Respondent.)	
)	

RESPONDENT’S PROFFER ON AWARD OF COMPENSATION

I. Items of Compensation

A. Life Care Items

Respondent engaged life care planner Laura Fox, MSN, RN, CNCLP, and petitioner engaged Maureen Clancy, RN, BSN, CLCP, to provide an estimation of B.K.’s future vaccine-injury related needs. For the purposes of this proffer, the term “vaccine related” is as described in respondent’s Rule 4(c) Report filed September 4, 2012. All items of compensation either identified in the joint life care plan are illustrated by the chart entitled Appendix A: Items of Compensation for B.K., attached hereto as Tab A.¹ Respondent proffers that B.K. should be awarded all items of compensation set forth in the joint life care plan and illustrated by the chart attached at Tab A. Petitioner agrees.

B. Lost Future Earnings

The parties agree that based upon the evidence of record, B.K. will not be gainfully employed in the future. Therefore, respondent proffers that B.K. should be awarded lost future

¹ The chart at Tab A illustrates the annual benefits provided by the joint life care plan. The annual benefit years run from the date of judgment up to the first anniversary of the date of judgment, and every year thereafter up to the anniversary of the date of judgment.

earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(B). Respondent proffers that the appropriate award for B.K.'s lost future earnings is \$800,000.00. Petitioner agrees.

C. Pain and Suffering

Respondent proffers that B.K. should be awarded \$238,980.47 in actual and projected pain and suffering. This amount reflects that the award for projected pain and suffering has been reduced to net present value. *See* 42 U.S.C. § 300aa-15(a)(4). Petitioner agrees.

D. Past Unreimbursable Expenses

Evidence supplied by petitioner documents her expenditure of past unreimbursable expenses related to B.K.'s vaccine-related injury. Respondent proffers that petitioner should be awarded past unreimbursable expenses in the amount of \$7,506.60. Petitioner agrees.

E. Medicaid Lien

Respondent proffers that B.K. should be awarded funds to satisfy the State of Arkansas Medicaid lien in the amount of \$165,066.70, which represents full satisfaction of any right of subrogation, assignment, claim, lien, or cause of action the State of Arkansas may have against any individual as a result of any Medicaid payments the State of Arkansas has made to, or on behalf of, B.K. from the date of her eligibility for benefits through the date of judgment in this case as a result of her vaccine-related injury suffered on or about February 6, 2009, under Title XIX of the Social Security Act.

II. Form of the Award

The parties recommend that the compensation provided to B.K. should be made through a combination of lump sum payments and future annuity payments as described below, and request that the Special Master's decision and the Court's judgment award the following:²

A. A lump sum payment of \$1,164,147.29, representing compensation for life care expenses expected to be incurred during the first year after judgment (\$125,166.82), lost future earnings (\$800,000.00), and pain and suffering (\$238,980.47) in the form of a check payable to petitioner as guardian/conservator of B.K., for the benefit B.K. No payments shall be made until petitioner provides respondent with documentation establishing that she has been appointed as the guardian/conservator of B.K.'s estate. If petitioner is not authorized by a court of competent jurisdiction to serve as guardian/conservator of the estate of B.K., any such payment shall be made to the party or parties appointed by a court of competent jurisdiction to serve as guardian/conservator of the estate of B.K. upon submission of written documentation of such appointment to the Secretary.

B. A lump sum payment of \$7,506.60, representing compensation for additional past unreimbursable expenses, in the form of a check payable to petitioner, Misty Kelm.

C. A lump sum payment of \$165,066.70, representing compensation for satisfaction of the State of Arkansas Medicaid lien, payable jointly to petitioner and

State of Arkansas Medicaid
Office of Policy and Legal Services
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P.O. Box 1437, Slot S260
Little Rock, AR 72203-1437
Medicaid Case No: 148862
Attn: Ms. Angie Foster

² Should B.K. die prior to entry of judgment, respondent would oppose any award for future medical expenses, future lost earnings, and future pain and suffering, and the parties reserve the right to move the Court for appropriate relief.

Petitioner agrees to endorse this payment to the State of Arkansas.

D. An amount sufficient to purchase an annuity contract,³ subject to the conditions described below, that will provide payments for the life care items contained in the life care plan, as illustrated by the chart at Tab A, attached hereto, paid to the life insurance company⁴ from which the annuity will be purchased.⁵ Compensation for Year Two (beginning on the first anniversary of the date of judgment) and all subsequent years shall be provided through respondent's purchase of an annuity, which annuity shall make payments directly to petitioner (or any other party who is appointed) as guardian/conservator of the estate of B.K., only so long as B.K. is alive at the time a particular payment is due. At the Secretary's sole discretion, the periodic payments may be provided to petitioner in monthly, quarterly, annual or other installments. The "annual amounts" set forth in the chart at Tab A describe only the total yearly sum to be paid to petitioner and do not require that the payment be made in one annual installment.

³ In respondent's discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

⁴ The Life Insurance Company must have a minimum of \$250,000,000 capital and surplus, exclusive of any mandatory security valuation reserve. The Life Insurance Company must have one of the following ratings from two of the following rating organizations:

- a. A.M. Best Company: A++, A+, A+g, A+p, A+r, or A+s;
- b. Moody's Investor Service Claims Paying Rating: Aa3, Aa2, Aa1, or Aaa;
- c. Standard and Poor's Corporation Insurer Claims-Paying Ability Rating: AA-, AA, AA+, or AAA;
- d. Fitch Credit Rating Company, Insurance Company Claims Paying Ability Rating: AA-, AA, AA+, or AAA.

⁵ Petitioner authorizes the disclosure of certain documents filed by the petitioner in this case consistent with the Privacy Act and the routine uses described in the National Vaccine Injury Compensation Program System of Records, No. 09-15-0056.

1. Growth Rate

Respondent proffers that a four percent (4%) growth rate should be applied to all non-medical life care items, and a five percent (5%) growth rate should be applied to all medical life care items. Thus, the benefits illustrated in the chart at Tab A that are to be paid through annuity payments should grow as follows: four percent (4%) compounded annually from the date of judgment for non-medical items, and five percent (5%) compounded annually from the date of judgment for medical items. Petitioner agrees.

2. Life-contingent annuity

Petitioner will continue to receive the annuity payments from the Life Insurance Company only so long as B.K. is alive at the time that a particular payment is due. Written notice shall be provided to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of B.K.'s death.

3. Guardianship

No payments shall be made from the annuity until petitioner provides respondent with documentation establishing that she has been appointed as the guardian/conservator of B.K.'s estate. If petitioner is not authorized by a court of competent jurisdiction to serve as guardian/conservator of the estate of B.K., any such payment shall be made to the party or parties appointed by a court of competent jurisdiction to serve as guardian/conservator of the estate of B.K. upon submission of written documentation of such appointment to the Secretary.

III. Summary of Recommended Payments Following Judgment

A.	Lump Sum paid to petitioner as guardian/conservator of B.K.'s estate:	\$1,164,147.29
B.	Lump Sum paid to petitioner, Misty Kelm:	\$ 7,506.60
C.	Reimbursement for Medicaid Lien:	\$ 165,066.70
D.	An amount sufficient to purchase the annuity contract described above in section II. D.	

Respectfully submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General

RUPA BHATTACHARYYA
Director
Torts Branch, Civil Division

VINCENT J. MATANOSKI
Deputy Director
Torts Branch, Civil Division

GLENN A. MACLEOD
Senior Trial Counsel
Torts Branch, Civil Division

s/ LARA A. ENGLUND
LARA A. ENGLUND
Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 146
Benjamin Franklin Station
Washington, D.C. 20044-0146
Tel: (202) 307-3013

DATED: October 7, 2014

Appendix A: Items of Compensation for B.K.

ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum Compensation Year 1	Compensation Year 2	Compensation Year 3	Compensation Year 4	Compensation Year 5	Compensation Year 6	Compensation Year 7	Compensation Year 8	Compensation Year 9
				2014	2015	2016	2017	2018	2019	2020	2021	2022
Home Mods	0%			40,000.00								
Lost Future Earnings				800,000.00								
Pain and Suffering				238,980.47								
Past Expenses				7,506.60								
Medicaid Lien				165,066.70								
Annual Totals				1,336,720.59	84,260.83	83,925.21	82,287.64	82,771.64	82,686.64	82,183.75	82,602.64	82,243.75

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.
 Compensation Year 2 consists of the 12 month period commencing on the first anniversary of the date of judgment.
 As soon as practicable after entry of judgment, respondent shall make the following payment to the court-appointed guardian(s)/ conservators(s) of the estate of B.K. for the benefit of B.K., for lost future earnings (\$800,000.00), pain and suffering (\$238,980.47), and Yr 1 life care expenses (\$125,166.82): \$1,164,147.29.
 As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner, Misty Kelm, for past un-reimbursable expenses: \$7,506.60.
 As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioner and the State of Arkansas, as reimbursement of the state's Medicaid lien: \$165,066.70.
 Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment. Annual amounts shall increase at the rates indicated in column "G.R." above, compounded annually from the date of judgment. Items denoted with an asterisk (*) covered by health insurance and/or Medicare.
 In the discretion respondent, items denoted with an "M" payable in 12 monthly installments summing to annual amounts given.

Appendix A: Items of Compensation for B.K.

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 10	Compensation Year 11	Compensation Year 12	Compensation Year 13	Compensation Year 14	Compensation Year 15	Compensation Year 16	Compensation Year 17	Compensation Years 18-20
				2023	2024	2025	2026	2027	2028	2029	2030	2031-2033
Home Mods	0%											
Lost Future Earnings												
Pain and Suffering												
Past Expenses												
Medicaid Lien												
Annual Totals				82,516.64	82,957.75	82,347.64	82,243.75	81,765.63	81,202.06	81,704.95	107,557.63	107,473.63

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.
 Compensation Year 2 consists of the 12 month period commencing on the first anniversary of the date of judgment.
 As soon as practicable after entry of judgment, respondent shall make the following payment to the court-appointed guardian(s)/ conservators(s) of the estate of B.K. for the benefit of B.K., for lost future earnings (\$800,000.00), pain and suffering (\$238,980.47), and Yr 1 life care expenses (\$125,166.82): \$1,164,147.29.
 As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner, Misty Kelm, for past un-reimbursable expenses: \$7,506.60.
 As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioner and the State of Arkansas, as reimbursement of the state's Medicaid lien: \$165,066.70.
 Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment. Annual amounts shall increase at the rates indicated in column "G.R." above, compounded annually from the date of judgment. Items denoted with an asterisk (*) covered by health insurance and/or Medicare.
 In the discretion respondent, items denoted with an "M" payable in 12 monthly installments summing to annual amounts given.

Appendix A: Items of Compensation for B.K.

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 21	Compensation Year 22	Compensation Year 23	Compensation Year 24	Compensation Year 25	Compensation Year 26	Compensation Year 27	Compensation Year 28	Compensation Year 29
				2034	2035	2036	2037	2038	2039	2040	2041	2042
Home Mods	0%											
Lost Future Earnings												
Pain and Suffering												
Past Expenses												
Medicaid Lien												
Annual Totals				107,885.47	107,630.11	107,706.79	107,831.47	107,933.71	107,984.83	108,061.63	108,138.31	108,186.19

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.
 Compensation Year 2 consists of the 12 month period commencing on the first anniversary of the date of judgment.
 As soon as practicable after entry of judgment, respondent shall make the following payment to the court-appointed guardian(s)/ conservators(s) of the estate of B.K. for the benefit of B.K., for lost future earnings (\$800,000.00), pain and suffering (\$238,980.47), and Yr 1 life care expenses (\$125,166.82): \$1,164,147.29.
 As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner, Misty Kelm, for past un-reimbursable expenses: \$7,506.60.
 As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioner and the State of Arkansas, as reimbursement of the state's Medicaid lien: \$165,066.70.
 Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment.
 Annual amounts shall increase at the rates indicated in column "G.R." above, compounded annually from the date of judgment.
 Items denoted with an asterisk (*) covered by health insurance and/or Medicare.
 In the discretion respondent, items denoted with an "M" payable in 12 monthly installments summing to annual amounts given.

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 30	Compensation Year 31	Compensation Year 32	Compensation Year 33	Compensation Year 34	Compensation Year 35	Compensation Year 36	Compensation Year 37	Compensation Year 38
				2043	2044	2045	2046	2047	2048	2049	2050	2051
Home Mods	0%											
Lost Future Earnings												
Pain and Suffering												
Past Expenses												
Medicaid Lien												
Annual Totals				108,237.31	108,262.99	108,288.55	108,314.11	108,339.67	108,390.79	108,441.91	108,518.59	108,592.15

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.
 Compensation Year 2 consists of the 12 month period commencing on the first anniversary of the date of judgment.
 As soon as practicable after entry of judgment, respondent shall make the following payment to the court-appointed guardian(s)/ conservators(s) of the estate of B.K. for the benefit of B.K., for lost future earnings (\$800,000.00), pain and suffering (\$238,980.47), and Yr 1 life care expenses (\$125,166.82): \$1,164,147.29.
 As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner, Misty Kelm, for past un-reimbursable expenses: \$7,506.60.
 As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioner and the State of Arkansas, as reimbursement of the state's Medicaid lien: \$165,066.70.
 Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment. Annual amounts shall increase at the rates indicated in column "G.R." above, compounded annually from the date of judgment. Items denoted with an asterisk (*) covered by health insurance and/or Medicare.
 In the discretion respondent, items denoted with an "M" payable in 12 monthly installments summing to annual amounts given.

Appendix A: Items of Compensation for B.K.

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 39	Compensation Year 40	Compensation Year 41	Compensation Years 42-59	Compensation Years 60-Life
				2052	2053	2054	2055-2072	2073-Life
BCBS AR Gold MOP	5%			3,800.00	3,800.00	3,800.00		
BCBS AR Gold Premium	5%		M	4,336.92	4,464.72	4,614.96		
Medicare Part B Premium	5%		M				1,258.80	1,258.80
Medicare Part B Deductible	5%	*					147.00	
Medigap	5%		M				3,338.40	2,007.00
Medicare Part D	5%		M				841.20	841.20
Pediatrician/ PCP	5%	*						
Neurologist	5%	*						
Sleep MD	5%	*						
Psychiatrist	5%	*						
Urology	5%	*						
Dental Cleaning	5%			300.00	300.00	300.00	300.00	300.00
EEG	5%	*						
Sleep EEG	5%	*						
Chest X-ray	5%	*						
Kidney Ultrasound	5%	*						
CBC	5%	*						
Cholesterol	5%	*						
Urinalysis	5%	*						
Clonidine	5%	*						
Flovent	5%	*						
Ventolin	5%	*						
Diastat	5%	*					344.04	344.04
Risperidone	5%	*						
Prevacid	5%	*						
Zyrtec	4%			11.76	11.76	11.76	11.76	11.76
Mirilax	4%			94.80	94.80	94.80	94.80	94.80
Gummy Fiber Bears	4%			39.91	39.91	39.91	39.91	39.91

Appendix A: Items of Compensation for B.K.

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 39	Compensation Year 40	Compensation Year 41	Compensation Years 42-59	Compensation Years 60-Life
				2052	2053	2054	2055-2072	2073-Life
PT	4%	*					190.00	190.00
OT	4%	*					145.00	145.00
ST	4%	*					100.00	100.00
Behavioral Therapy	4%	*						
Hippo Therapy	4%							
Nutritionist	4%			21.00	21.00	21.00	21.00	21.00
Home Monitoring	4%							
iPad	4%			79.80	79.80	79.80	79.80	79.80
Rocking Chair	4%							
Special Clothing & Footwear	4%							
Swim Jacket	4%			10.20	10.20	10.20	10.20	10.20
Pull Ups	4%							
Baby Wipes	4%							
10 cc Syringes	4%							
Hand Sanitizer	4%							
Disposable Gloves	4%							
Attendant Care School Days	4%		M					
Attendant Care Non School Days	4%		M					
Attendant Care Respite	4%		M					
Aqua Therapy	4%							
Residential Care	4%		M	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00
Mileage: Pediatrician, Neuro, YMCA, Hippo Therapy	4%							
Mileage: Urologist	4%							
Mileage: Psychiatrist	4%							
Mileage: Sleep MD	4%							
Mileage: Nutritionist	4%							

Appendix A: Items of Compensation for B.K.

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 39	Compensation Year 40	Compensation Year 41	Compensation Years 42-59	Compensation Years 60-Life
				2052	2053	2054	2055-2072	2073-Life
Home Mods	0%							
Lost Future Earnings								
Pain and Suffering								
Past Expenses								
Medicaid Lien								
Annual Totals				108,694.39	108,822.19	108,972.43	106,921.91	105,443.51

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.
 Compensation Year 2 consists of the 12 month period commencing on the first anniversary of the date of judgment.
 As soon as practicable after entry of judgment, respondent shall make the following payment to the court-appointed guardian(s)/ conservators(s) of the estate of B.K. for the benefit of B.K., for lost future earnings (\$800,000.00), pain and suffering (\$238,980.47), and Yr 1 life care expenses (\$125,166.82): \$1,164,147.29.
 As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner, Misty Kelm, for past un-reimbursable expenses: \$7,506.60.
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 Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment. Annual amounts shall increase at the rates indicated in column "G.R." above, compounded annually from the date of judgment. Items denoted with an asterisk (*) covered by health insurance and/or Medicare.
 In the discretion respondent, items denoted with an "M" payable in 12 monthly installments summing to annual amounts given.